Supreme Court, U.S.
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No. 92-696

In The

Supreme Court of the United States

October Term, 1992

CITY OF YOUNGSTOWN, ET AL.,

Petitioners,

v.

BARBARA MARTIN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

ISSUE I A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN A CASE WHERE THE COURT OF APPEALS CORRECTLY FOUND ABUSE OF DISCRETION BECAUSE THE LOWER COURT FAILED TO WEIGH THE EVIDENCE IN DECIDING ON A MOTION FOR A NEW TRIAL AND ISSUING A BENCH RULING UNDER TITLE VII.

ISSUE II A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE THE ISSUES PRESENTED BY THE PETITIONER ARE BASED SOLELY ON ISSUES OF FACT SPECIFIC TO THIS CASE.

ISSUE III A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE PETITIONER HAS FAILED TO FOLLOW PROPER PROCEDURE AND WHERE THE FILING OF THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Barbara Martin respectfully prays that this Court deny a writ of certiorari and dismiss the petition.

OPINIONS BELOW

On March 5, 1991, the Memorandum Opinion and Judgment Entry of the United States District Court for the Northern District of Ohio was issued. In the Opinion, the Court upheld the 42 U.S.C. Section 1983 jury verdict in a

preliminary Interrogatory that no unlawful sexual harassment had occurred and denied Plaintiff's Motion for a New Trial. The lower court issued findings of fact and conclusions of law that Petitioner was liable for retaliation in violation of 42 U.S.C. Section 2000e *et seq.* but did not issue findings of fact and conclusions of law on the sexual harassment claim under 42 U.S.C. Section 2000e, *et seq.*

On April 28, 1992, the Sixth Circuit issued its per curiam opinion finding that as a matter of law sexual harassment had occurred. The Court upheld the lower court's conclusion that retaliation had occurred and remanded for a calculation of damages including back pay.

On July 13, in response to a "Petition for Rehearing En Banc" filed by Petitioner, the Sixth Circuit corrected its erroneous standard of review cited on April 28, found that the lower court had abused its discretion and denied the Petition. The Mandate on this second order was issued on July 21, 1992.

None of these opinions are reported. Petitioner attached each of them in its Appendix, but numerous errors in the Appendix create an undependable record for this Court to review.

JURISDICTION

The discretionary jurisdiction of this Court arises under 28 U.S.C. Section 1254(1).

Respondent respectfully requests that the Court not exercise its discretionary jurisdiction where Petitioner seeks only to have a review of factual issues having no exceptional importance to development of the law. Petitioner does not allege the Sixth Circuit Opinion is in conflict with other circuits or controlling law.

STATUTES INVOLVED

Petitioner cites the statutes involved: 42 U.S.C. Section 1983 and 42 U.S.C. Section 2000e, *et seq.*, also known as "Title VII."

STATEMENT OF THE CASE

As the first female wastewater treatment plant operator in the City of Youngstown, Barbara Martin endured months of sexually offensive behavior, numerous incidents of difference in treatment based on sex, and was forced to work in an environment generally hostile to her on the basis of her sex.

After complaining to her immediate supervisor for several months without remedy, Martin sought assistance through upper level management and Petitioner's Equal Employment Opportunity officer.

When she began to aggressively pursue her complaints, Martin was assigned less desirable work assignments. She was generally ignored by her co-workers. Her health and safety were in jeopardy as a result of this retaliatory behavior.

Martin filed a Complaint in the United States District Court for the Northern District of Ohio. She alleged violations of her rights under 42 U.S.C. Section 2000e, *et seq.* for sex discrimination, sexual harassment and retaliation. Pursuant to 42 U.S.C. Section 1983, she alleged a pattern and practice and failure to train which led to these violations of her rights.

During the day and a half of her own testimony she described in detail the dozens of incidents leading to her filing her charges of discrimination based on sexual harassment and retaliation. Four other City of Youngstown employees, also women in non-traditional positions (police officers, paramedic and water department workers), testified about their complaints of incidents of sexual harassment that remained unresolved. Their testimony demonstrated a pattern by the EEO office of the City of Youngstown to ignore such complaints.

Petitioner contradicted some incidents. Numerous other incidents were admitted by defense witnesses or not addressed by the defense. This uncontradicted evidence, in and of itself, was enough to establish sexual harassment.

Among the uncontroverted evidence of a sexually hostile environment were the following incidents:

* A note delivered to Martin from a supervisor (who was also the Union president) implying an invitation for sex. The union president never testified. The note is an exhibit.

* The same supervisor/Union president pushed a pencil between Martin's legs as she

sat talking with co-workers. Defense witnesses acknowledge this happened.

* Sexually explicit magazines were placed throughout the plant, including in the drawer of Martin's work desk. When she threw them away, co-workers replaced them.

* Untrue rumors about sexual relationships between Martin and co-workers were spread. Defense witnesses admitted hearing these rumors.

Her supervisor also admitted kissing her and making comments about her body, but alleged that these incidents were not intended to be offensive. Throughout Martin's first seven months, Petitioner never took action to remedy the sexually hostile environment. Her immediate supervisor testified that he took no action because he did not believe her complaints constituted sexual harassment.

Putting aside that certain evidence was challenged, the unchallenged evidence constituted sexual harassment in violation of Title VII. The Sixth Circuit was so astounded by the large amount of undisputed evidence that it acted to correct the lower court's error.

The jury verdict addressed only the Title VII claim.

Because of the nature of review of a Section 1983 claim, a jury is first required to determine whether facts were presented to support the underlying act alleged to be unlawful. Here, Title VII violations in the form of sexual harassment and retaliation were alleged. The Court presented a number of interrogatories to the jury.

The jurors were to respond to these interrogatories in an orderly fashion to decide whether a pattern or practice of sexual harassment led to a violation of Section 1983.

Interrogatory One required the jury to determine if "unlawful sexual harassment" had occurred. The jury responded with a "no" answer and ceased deliberations. The subsequent interrogatories relating to a determination under Section 1983 were never answered.

In ruling on the Title VII allegation of sexual harassment, the Judge was bound by the verdict in Interrogatory One unless he decided the verdict was against the manifest weight of the evidence. After briefing by the parties, but without reviewing the record, the Judge upheld the verdict in Interrogatory One and did not find that sexual harassment occurred pursuant to Title VII. He issued no findings of fact or conclusions of law stating:

> . . . in any event, [the Court] will adopt the jury's position on the merits of the Plaintiff's Title VII claim . . .

The judge apparently felt compelled to uphold the jury verdict without recognizing he had the power to reweigh the evidence. The lower court made no attempt to detail or review the facts supporting the sexual harassment claim. He did find facts and legally conclude that Martin had been retaliated against.

The Motion for New Trial was denied without any balancing of the evidence relating to the sexual harassment claims.

Procedure on Appeal to the Sixth Circuit.

Martin filed an appeal at the Sixth Circuit arguing the jury verdict in Interrogatory One was against the manifest weight of the evidence and that the Judge should have granted a new trial. Petitioner cross-appealed, alleging that the Judge should not have found a violation of Title VII based on retaliation.

In responding to Martin's appeal brief, Petitioner set forth the wrong legal standard, arguing that the denial of Martin's motion for new trial was not "clearly erroneous."

Other issues were also addressed at the Sixth Circuit which Petitioner has not challenged in its Petition for Writ of Certiorari.

After briefing and oral argument, the Sixth Circuit issued an order on April 28, 1992. The Court examined the record in detail and found "undisputed facts very persuasive." The Court concluded "that the verdict that Martin was not sexually harassed is unsupported by the evidence at trial. We believe that the undisputed ongoing conduct by Martin's male counterparts created an abusive work environment." The Court reversed the jury verdict contained in Interrogatory One and held that "Martin was sexually harassed during her employment."

Having found that the jury verdict of Interrogatory One was against the manifest weight of the evidence, the Sixth Circuit proceeded to determine if the trial judge properly ruled on the Title VII claims.

Prior to the Civil Rights Act of 1991, all Title VII claims required a bench trial. However, as in this case,

where Title VII is the statute underpinning a Section 1983 claim, a jury first makes findings of fact on the underlying claim. Finding that the "verdict" contained in Interrogatory One was against the manifest weight of the evidence, the Sixth Circuit mistakenly applied the "clearly erroneous" standard cited by Petitioner in its appellate brief. Based on the record that sexual harassment clearly occurred the Court reversed the verdict and remanded for a calculation of damages.

The Sixth Circuit found other abuses of discretion by the lower court.

During voir dire all jurors were questioned and denied having friends or relatives working for the City or at the wastewater treatment plant. Just before trial began, after all prospective jurors had been dismissed, Petitioner disclosed to the Court that one juror was a cousin of a top manager at the plant.

Upon further questioning, the juror denied knowing about the manager's work. She assured the court her decision as a juror would not be influenced.

After trial, during informal conversation among the attorneys and counsel, this particular juror was very outspoken against Martin. Martin researched this juror's background and learned that she had another relative working at the plant during the relevant time period, and that she had numerous other relatives who had worked or were working for the City. Martin alerted the lower court but was denied a hearing on the issue.

At the Sixth Circuit, Martin repeated allegations raised below. Juror perjury should have required the

lower court to grant a new trial under the ruling of *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981).

In its April 28 ruling, the Sixth Circuit was "compelled" to review the juror perjury issue and "admonish the district court for its failure to conduct a hearing on this important matter." The Sixth Circuit held the lower court's error to be "harmless," because it had ruled in favor of Martin on other grounds.

Petitioner does not raise this ruling in seeking a writ of certiorari. If Petitioner were successful in obtaining the writ and ultimately receiving a favorable ruling from the Supreme Court, the juror perjury would no longer be "harmless" and a new trial would likely be required on that basis.

The "Petition for Rehearing En Banc."

After the Sixth Circuit ruled in favor of Martin, Petitioner filed a "Petition for Rehearing En Banc" with the Sixth Circuit, arguing that the Court used the wrong standard of review and rearguing the facts previously reviewed. Petitioner inaccurately characterized the Sixth Circuit decision as one of weighing credibility, when in fact the Sixth Circuit had not done so. The Sixth Circuit had issued its ruling based on the uncontroverted facts, where a weighing of credibility is not required.

By Order dated July 13, the Sixth Circuit denied the Petition for Rehearing En Banc. The panel corrected the record as to its review:

> In light of those undisputed facts which we have outlined in the original opinion, this Court

> holds that the jury verdict was against the manifest weight of the evidence and the district court abused its discretion in denying plaintiff's motion for a new trial.

The Court properly cited to *TCP Industries v. Uniroyal*, 661 F.2d 542 (6th Cir. 1981), a case where the "abuse of discretion" standard was applied to review the lower court's denial of a motion for a new trial.

On October 16, 1992, Petitioner formally filed its Petition for Writ of Certiorari which is now before this Supreme Court of the United States. Petitioner continues to confuse the standard of review by citing to directed verdict and judgment NOV cases not applicable here.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

ISSUE I: A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN A CASE WHERE THE COURT OF APPEALS CORRECTLY FOUND ABUSE OF DISCRETION BECAUSE THE LOWER COURT FAILED TO WEIGH THE EVIDENCE IN DECIDING ON A MOTION FOR A NEW TRIAL AND ISSUING A BENCH RULING UNDER TITLE VII.

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. Rule 10, Rules of the Supreme Court of the United States.

Where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretation, the usual rule of the Supreme Court is one of non-interference. *FTC v. American Tobacco Co.*, 274 U.S. 543, 544 (1927); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951); *FTC v. Standard Oil Co.*, 355 U.S. 396, 400 (1958).

Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co. v. N.C. Public Service Co.*, 263 U.S. 508 (1924); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Petitioner does not allege that its Questions Presented for Review are of great importance nor that the Sixth Circuit ruling is inconsistent with controlling law or other circuits. Rather, Petitioner argues that the Sixth Circuit needs supervision because it should not have weighed the credibility of witnesses.

The Sixth Circuit did not weigh credibility.

Nowhere in its Opinions does the Sixth Circuit indicate that it weighed the credibility of witnesses or evidence. Instead, the Court thoroughly reviewed the record

and found abuse of discretion because the jury verdict in Interrogatory One was against the manifest weight of the evidence and the lower court failed in its obligation to weigh that evidence. Casting aside any factual disputes, the Appeals Court found that the undisputed evidence painted a picture of a sexually hostile environment in violation of Title VII and remanded.

The Sixth Circuit found abuse of discretion.

To rule on a motion for a new trial, a district court is required to compare opposing proofs, weigh the evidence, and set aside the verdict if it is against the clear weight of the evidence and not one that could reasonably have been reached. *Bondie v. BIC Corp.*, 947 F.2d 1531 (6th Cir. 1991), citing to *J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co.*, 936 F.2d 1474 (6th Cir. 1991); *Fryman v. Federal Crop Insurance Corp.*, 936 F.2d 244 (6th Cir. 1991); *Logan v. Dayton Hudston Corp.*, 865 F.2d 789 (6th Cir. 1989); and *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir., 1982), *cert. denied sub nom, Bates v. Bruner*, 459 U.S. 1171 (1983).

The judge may grant a new trial if "having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . " 11 C. Wright & A. Miller, Federal Practice & Procedures, Civil, Section 2806. This standard is analogous to that used by appellate courts when reviewing a trial court's findings of fact in a non-jury case. See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

The Sixth Circuit reviewed the evidence to decide both the abuse of discretion/failure to grant a new trial

and the Title VII/sexual harassment issues raised on appeal.

If a trial court fails to exercise its discretion under the mistaken belief that it has no power to grant a new trial, the appellate court can review and rectify the abuse of discretion. *Charles v. Norfolk & Western Ry. Co.*, 188 F.2d 691 (7th Cir. 1951); *Georgia Pacific Corp. v. United States*, 264 F.2d 161 (5th Cir. 1959); and *United States v. Simmons*, 346 F.2d 213 (5th Cir. 1965).

> "Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. *McBee v. Bomar*, 296 F.2d 235, 237 (6th Cir. 1961)

The Sixth Circuit review of the lower court decision shows a recognition that the trial court did not perform the proper analysis. The Sixth Circuit was convinced that the lower court committed a clear error of judgment and abused its discretion by not weighing the evidence. When the Sixth Circuit reviewed the evidence, it found "undisputed facts very persuasive." The panel found the sexually harassing environment could not have been welcomed, contrary to the jury's verdict in Interrogatory One, because Martin complained about it and her supervisor admitted at trial that she complained. The panel further found that "undisputed testimony supported Martin's testimony of rumors and comments of a sexual nature."

Because the Title VII claim of sexual harassment was a non-jury determination, the Sixth Circuit inherently found error in the judge's Title VII ruling and issued a finding of sexual harassment.

ISSUE II: A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE THE ISSUES PRESENTED BY THE PETITIONER ARE BASED SOLELY ON ISSUES OF FACT SPECIFIC TO THIS CASE.

Although a Petition for Certiorari that claims the judgment and opinion below might seriously hinder future administration of the law is grave and sufficiently probable to justify issuance of the writ, the writ should be denied when it appears that the proper decision of the controversy depends upon a question of fact. *FTC v. Standard Oil Company, supra,* at 400. Where the facts are not accurately stated, this Court should adhere to the usual rule of non-interference.

Petitioner argues that the Sixth Circuit made a "credibility" decision. Contrary to what Petitioner asserts, the Sixth Circuit did not need to weigh credibility because of the overwhelmingly uncontroverted evidence. The Sixth Circuit's examination of facts was necessary to determine if the lower court abused its discretion. Had the lower court carefully reviewed the evidence, the undisputed facts would have led to a Title VII judgment for Martin.

Petitioner now asks the Supreme Court to review the facts of this case and determine that the undisputed evidence is not believable, therefore the district court didn't abuse its discretion. This Court should not exercise

its jurisdiction to hear a case where the outcome will be for the sole benefit of the parties in a single case.

Petitioner states that the Sixth Circuit panel used the wrong standard of review in reversing the jury verdict and finding sexual harassment. Petitioner is confused. The Sixth Circuit's July 13 Order correcting the record and finding abuse of discretion resolves any ambiguities or errors in the April 28 Opinion.

The Petition contains numerous misstatements of facts.

The Petition for Writ of Certiorari does not contain an accurate picture of the evidence on the record. Numerous misstatements of fact cannot be substantiated by the trial transcript and the record below. Petitioner substitutes its own opinion of what the record should say.

For example, Petitioner states that Martin was hired after "she only placed twelfth on the eligibility list." Petioner fails to explain that Martin was the next, legally eligible candidate, but Petitioner was stalling the hiring process until the eligibility list expired. Martin was hired only after her attorney contacted the EEO officer.

Petitioner ignores the supervisor's admission at trial that Martin complained within a month of starting her employment. This supervisor clearly is management, and places Petitioner on notice. That Martin did not legally fight the issues of sexual harassment until seven months thereafter does not provide a defense to Petitioner for failing to take prompt, remedial action.

Petitioner falsely claims that Martin did not complain about sexual harassment until after she failed the licensing exam. Martin took the exam while under emotional distress just after her meeting with several of the managers at the plant. She and her psychologist both provided testimony on the issue.

Martin never testified that everything was "fine" after she was transferred to the new crew. To the contrary, supporting the finding of retaliation by the trial judge, Martin gave indepth evidence of retaliation after her transfer to the new crew.

Petitioner's discussion of Appellant's alleged "personal problems" are irrelevant to the sexual harassment issue.

This Court should not be persuaded to issue a Writ of Certiorari where Petitioner conveys a fictional view of the record in order to secure a writ of certiorari.

ISSUE III: A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE PETITIONER HAS FAILED TO FOLLOW PROPER PROCEDURE AND WHERE THE FILING OF THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY.

The Petition for Writ of Certiorari is technically deficient in several respects. Petitioner has not complied with the Rules of the Supreme Court. Since Petitioner has not provided this Court with any "special and important reasons" for granting a writ, these technical deficiencies should not be overlooked.

The petition was not timely.

A petition for a writ of certiorari to review a judgment in any civil case shall be deemed timely when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. The time for filing runs from the date the judgment sought to be reviewed is rendered, and not from the date of the issuance of the mandate. If a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. Rule 13, Rules of the Supreme Court of the United States.

After the Sixth Circuit issued its April 28th ruling, Petitioner filed a "Petition for Rehearing En Banc." The Sixth Circuit apparently treated this as a petition for rehearing, rather than a suggestion for rehearing en banc, when it ordered the Clerk to enter the July 13 Order. July 13 should be the date which controls the running of the 90-day filing deadline.

On October 9, 1992, the Clerk of the Supreme Court returned to Petitioner 39 copies of its Petition "for failure to comply with this Court's Rules of Procedure." The Clerk instructed Petitioner as to the proper format to be used, referring Petitioner to various Rules of the Supreme Court. Petitioner never served Respondent with a copy of what was originally sent to the Clerk.

Respondent did not receive a copy of the Petition until October 21, 1992. The certificate of service signed by counsel for Petitioner states that the Petition was mailed

by regular U.S. mail on October 16, but the postmark demonstrates that it was mailed on October 20th, explaining why Respondent did not receive it until October 21st.

Petitioner misrepresented to the Court the actual date of service. October 16th was a Friday. On the assumption that the mail may have been in a mailbox over the weekend, the postmark still should have been for October 19, not October 20.

On October 29, Respondent received Notice from Petitioner that a Petition for Writ of Certiorari "was filed in the Supreme Court of the United States on the 8th day of October, 1992." The Petition served by Petitioner was signed by counsel for the Petitioner on October 16, 1992, ninety-five days after July 13.

The Questions Presented for Review go to the opinion of the Sixth Circuit dated April 28. Petitioner herein argues the same errors raised in its Petition for Rehearing En Banc at the appellate level, prior to and leading to the Sixth Circuit's July 13 corrective order.

Since Petitioner chooses to ignore the July 13 corrective order, and continues to attack the standard of review error of April 28, the ninety-day filing deadline should run from July 13. If so, the Petition is untimely and should be dismissed.

Service was improper.

Rule 29.3 of the Rules of the Supreme Court require that service is to be made "at or before the time of filing." Petitioner did not serve Respondent on October 8th, the alleged date of filing and did not serve Respondent on or

before October 16th, the date of signature contained on the Petition.

Rule 29.3 also requires that "three copies shall be served on each party." Petitioner only mailed one copy of the Petition for Writ of Certiorari to Respondent.

The Appendix is faulty.

Petitioner has presented an inaccurate reporting of the record below. The Appendix contains punctuation and typing errors. Words are left out, misspelled or inverted.

Several phrases are omitted from the District Court opinion at App. 60. A wrong date appears on App. 64.

Pages are out of order and do not accurately reflect the true opinions below. For example, App. 24 belongs after App. 11; App. 34 should be App. 33, and vice versa.

Because of these numerous deficiencies in the Petition, Respondent respectfully requests that this Court find that the Petition was not timely filed and served and that discretionary jurisdiction should not be exercised to issue a writ of certiorari.

CONCLUSION

Petitioner has not identified any special or important reasons for granting a writ of certiorari. The decision by the Sixth Circuit is supported by and consistent with Supreme Court and controlling law. The Sixth Circuit

corrected any errors which may have occurred in deciding the issues on appeal.

Petitioner is merely rearguing its view of the facts of this case. The facts contained in the trial record below do not substantiate the statement of facts as set forth by the Petitioner. Petitioner is also confused by the differing legal standards.

The Supreme Court should not issue a writ of certiorari to Petitioner in this case.

Respectfully submitted,

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